No. 80-1809

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. GUZZARDO,

Petitioner,

vs.

PAUL J. BERGSTON, Sheriff of Winnebago County, Illinois and HONORABLE JOHN W. NIELSEN, Judge, 17th Judicial Circuit, Winnebago County, Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied his constitutional rights to confrontation and cross-examination of witnesses in his trial in the state court.

2. Whether the Illinois statute under which petitioner was convicted is unconstitutionally vague.

3. Whether petitioner was denied effective assistance of counsel at trial.

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The respondents respectfully request that the Petition for Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals entered on March 13, 1981, be denied.

I.

STATEMENT OF THE CASE

The statement of the case provided in the petition for writ of certiorari together with the opinion of the Seventh Circuit Court of Appeals and the order of the district court are sufficient to apprise this Court of the facts as they pertain to the issues raised in the petition.

II.

REASONS FOR DENYING THE WRIT

A.

Neither the Isolated, Unresponsive Remark of a State's Witness Nor the Single Comment in the Prosecutor's Opening Statement Was So Prejudicial That It Could Not Be Cured by Limiting Instructions to the Jury.

The general rule is that federal habeas corpus is not a proper proceeding in which to attack errors that are made at a state trial. *Frank* v. *Magnum,* 237 U. S. 309 (1915); *United States ex rel. Bibbs* v. *Twomey,* 506 F. 2d 1220, 1222-23 (7th Cir. 1974), *appeal after remand,* 538 F. 2d 151 (1976), *cert. denied,* 431 U. S. 941 (1977). Unless there is an error of such magnitude as to deny fundamental fairness, federal habeas corpus courts must refrain from putting themselves in the role of reviewing courts. *United States ex rel. Harris* v. *Illinois,* 457 F. 2d 191, 198 (7th Cir. 1972).

As with many issues of Fourteenth Amendment due process, each case must be decided on its unique facts. *United States ex rel. Kirk* v. *Petrelli,* 331 F. Supp. 792, 794-796 (N. D. Ill. 1971), *aff'd,* 492 F. 2d 1245 (7th Cir. 1974). The holdings of the trial court and the Illinois Appellate Court that any error committed was harmless, while not conclusive proof of harmlessness, have probative value towards showing that petitioner was not deprived of his constitutional rights. *Id.* at 795.

Similarly, the district court concluded that, in the context of the case as a whole, Gulbrantson's single statement was unimportant. Opinion at 10. His unresponsive and ambiguous answer to a legitimate and relevant question posed by the prosecutor was of insufficient magnitude to vitiate an otherwise fair trial. *Cf. Schneble* v. *Florida,* 405 U. S. 427 (1972). Whatever prejudice that might have occurred was mitigated by

the court's prompt instruction to the jury to disregard the statement. (TR. 46) An instruction advising the jury to disregard any questions to which objections were sustained was also delivered at the close of testimony. (TR. 135)

The second incident on which the plaintiff relies raises a question of prosecutorial conduct. During his opening statement, the assistant state's attorney, asserted that Linda Wooten would testify that on a prior occasion petitioner had paid her twenty dollars to perform an act of prostitution with another man. Petitioner objected. (TR. 22-30) Without ever ruling on the objection, the trial court instructed the jury that opening statements are not evidence and that the jury must decide whether or not a party had proved all the assertions made during opening arguments. (TR. 30-32) When, during the state's case-in-chief, the prosecutor attempted to elicit from Miss Wooten the information supporting his opening remarks, defense counsel again objected. (TR. 58) The court sustained this objection after counsel argued that the witness' response would be evidence of a prior bad act and was intended to show defendant's propensity to commit the offense charged. (TR. 59-65)

Alleged prejudicial statements by the prosecutor in a state trial are not reviewable in federal court unless they are so inflammatory and so prejudicial as clearly to deprive the accused of a constitutionally fair trial. *United States ex rel. Kirk* v. *Petrelli,* 331 F. Supp. 792, 794-95 (N.D. Ill. 1971), *aff'd,* 492 F. 2d 1245 (7th Cir. 1974). Petitioner must establish that the aggregate effect of the prosecutor's remarks had "a significant impact on the jury's deliberations," *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 646 (1974), and that they "most probably infected the whole decision-making process of the jury," *Bruce* v. *Estelle,* 483 F. 2d 1031, 1040 (5th Cir. 1973).

Opening statements must be evaluated in light of the totality of the circumstances in determining whether the defendant received a constitutionally fair trial. *See Kentucky* v.

Whorton, 441 U. S. 786 (1979). The weight of the evidence, the intent of the prosecutor in making the statement, and the statement's probable impact on the jury are all relevant considerations necessary to a determination of the issue.

Clearly, the prosecutor's comments were not motivated by any improper intentions. At the time of the opening remarks he fully intended to introduce evidence of the prior contact between Wooten and petitioner. The mere fact that the judge subsequently and unforeseeably excluded evidence of the prior contact should not impugn the intent of the prosecutor during his opening statement. The prosecutor could not possibly have known at the time that the trial judge would rule unfavorably on the proffered testimony. *See United States* v. *Akin,* 562 F. 2d 459, 466 (7th Cir. 1977), *cert. denied,* 435 U. S. 933 (1978).

Moreover, the effect that the purported reversible comment had upon the jury could not have been significant. During the course of the prosecutor's opening statement, the court informed the jury that his statement was not evidence. (TR. 30) This admonishment was incorporated into People's Instruction No. 4 and reiterated to the jurors before their deliberations. (TR. 138)

In sum, the Seventh Circuit Court of Appeals and the District Court were correct in finding that any injection of objectionable evidence at petitioner's trial was insubstantial and did not result in a deprivation of any of his constitutional rights, especially when weighed against all the evidence presented and the limiting instructions that were given.

B.

The Illinois Pandering Statute is Not Unconstitutionally Vague as It Provided Petitioner With Clear Notice of the Conduct It Proscribes.

The petitioner complains that the statute under which he was convicted, Section 11-16(a)(2) of the Penal Code of the Illinois Revised Statutes, is unconstitutionally vague on its face and, therefore, deprives him of due process of law. The relevant portion of the statute provides that:

> (a) Any person who performs any of the following acts for money commits pandering;
>
> (1) * * *
>
> (2) Arranges or offers to arrange a situation in which a female may practice prostitution.

Ill. Rev. Stat., ch. 38 § 11-16(a)(2) (1975).

A penal statute is void whenever it is so vague and lacking in ascertainable standards of guilt that it fails to give fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. *Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972); *Palmer* v. *City of Euclid,* 402 U. S. 544 (1971). However, a statute is not automatically invalid as vague simply because of difficulty in determining whether some marginal offenses fall within its language. *United States* v. *Powell,* 423 U. S. 87, 93 (1975); *United States* v. *National Dairy Products Corp.,* 372 U. S. 29, 33 (1963). Additionally, it is well established that vagueness challenges that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States* v. *Mazurie,* 419 U. S. 544, 550 (1975).

The petitioner relies substantially on the specificity requirements of *Smith* v. *Goguen,* 415 U. S. 566 (1974). The Seventh Circuit Court of Appeals in its decision found this reliance

misplaced. The court noted that *Smith* required a greater degree of specificity when First Amendment rights are affected, but specifically held that the Illinois pandering statute does not infringe on the exercise of one's freedom of expression. Thus, all that the statute under scrutiny here need do is provide fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. The court found that the Illinois pandering statute adequately meets these requirements and that petitioner's vagueness challenge was without merit.

C.

The Seventh Circuit Court of Appeals Correctly Found That Petitioner's Trial Counsel Aggressively and Competently Defended Petitioner.

In complaining of ineffective assistance of counsel, petitioner has taken a scattergun approach. Petitioner lists four mistakes of his trial counsel "based upon a reading of the entire transcript." Pet. Br. 23.

The Seventh Circuit also read the record and found:

> Our reading of the record reveals representation which was certainly adequate. Petitioner's trial counsel aggressively defended his client and provided competent legal representation.

Pet. Br., Seventh Cir. Op. 19.

The court found that the representation provided petitioner at least met the minimum standard of professional representation required by *United States ex rel. Ortiz* v. *Sielaff*, 542 F. 2d 377, 379 (7th Cir. 1976), and found that the points raised by petitioner as evidence of ineffective representation "reflect speculation and hindsight as to how petitioner's defense might have been improved." Pet. Br., Seventh Cir. Op. 17-18.

Petitioner's speculation as to how his defense might better have been presented does not rebut the presumption that his

trial counsel was conscious of his duties to his client and that he sought conscientiously to discharge those duties. *Matthews* v. *United States,* 518 F. 2d 1245 (7th Cir. 1975). Petitioner has failed to carry his burden of demonstrating ineffective representation.

III.

CONCLUSION

For the foregoing reasons the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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